No. 16047

United States

Court of Appeals

for the Ninth Circuit

COLUMBIA IRRIGATION DISTRICT, a corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STATE OF WASHINGTON, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Brief of Appellants

Appeals from the United States District Court
for the Eastern District of Washington,
Southern Division

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and
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JURISDICTION

This case is an eminent domain proceeding instituted by the United States in the District Court pursuant to Acts of Congress including 40 U.S.C., Section 257. Appellant invokes the jurisdiction of this Court under 28 U.S.C., Section 1291 as an appeal from a judgment of the U. S. District Court. The Amended Complaint (R.5) and the Judgment (R.80) show the existence of the jurisdictions.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

The United States instituted this proceeding to acquire by condemnation all interest of the Columbia Irrigation District in the lands described. The lands are described as Parcels I, II and III. Parcel I included fee title ownerships, Parcel III included easements owned and Parcel II included all lands taken by the United States from private owners which were within the boundaries of the Columbia Irrigation District. All of parcels I, II and III were subject to the District's bonds held by the State of Washington. The three parcels were physically contiguous.

The Trial Court directed that Parcels I and III be segregated from Parcel II and entered Judgment that the interests of the defendants in Parcel II, as so segregated, were non-compensable and said interests, by virtue of this proceeding, were vested in the United States. The defendants made an of-

fer of proof which was rejected. The offer comprises pages 58 to 76 of the record. In essence, the proof offered is that the United States, with the full co-operation of the State and the District, made a careful study of the value of the interests to be acquired (including Parcels I, II and III) and, in 1951, offered the District $149,000.00 for them. The District accepted the offer and as a part thereof, agreed to use the funds to fully retire the bonds held by the State. The United States prepared an agreement to this effect which was signed by the District on December 10, 1951. As prepared by the United States, the agreement was to be signed by the "Contracting Officer, Chief, Real Estate Division, Corps of Engineers, Walla Walla District".

In April of 1952, the United States advised the District, the "funds" would be deposited in the near future in the United States District Court. In lieu of that, this action was filed in 1953, no funds were deposited, and the United States attempted to repudiate its agreement.

The District's geographical location makes it somewhat unique in that it cannot expand to bring in more land. The District's plant is a gravity flow system using approximately forty-four miles of main canals. The taking of the lands in Parcels I, II and III changes the District from an economic facility to an uneconomic one since the facilities (with minor exceptions) and the cost of operating them remains fixed with the revenue vastly reduced. The

revenue loss equals approximately $13,000.00 a year. The cost of the facilities (and the bonded indebtedness) cannot be eliminated and the revenue lost cannot be replaced. In addition, since all of Parcel II is still in the District, the District is required by law to furnish water to it, if requested. Proof is offered that the area taken is excessive to the needs of the United States, leaving the potentiality that the United States will dispose of the excess to private owners who will request service.

As a result of the taking of the lands in Parcels I, II and III, the market value of the District has been reduced by $250,000.00.

The Trial Court found that there was no question but that the District has "suffered a very great financial loss because of the taking of these lands . . . and, of course, any plant, an irrigation plant, if it is not able to operate at full capacity, operates at an economic loss, as a rule, so that I think there has been a loss but I come reluctantly to the conclusion that it is consequential . . ." (R.74)

Thus, the question raised by this appeal through the offer of proof, is, is the obvious financial loss of the District a compensable loss? If an interest is taken why is it non-compensable? If no rights or interests are taken, why condemn them and enter a judgment "taking" them?

A secondary question is, is the United States

estopped to deny the agreement to pay the District $149,000.00?

A tertiary question is, can the United States destroy the present lien of the State as bondholder on the facilities taken without compensation being paid?

SPECIFICATIONS OF ERROR

(1) The Trial Court erred in segregating the issues of fact and law as to Parcel II from those of Parcels I and III.

(2) The Trial Court erred in rejecting the Offer of Proof. See Record pp. 55 to 76.

(3) The Trial Court erred in making and entering its Conclusions of Law and Judgment vesting all right, title and interest of the District in the lands in Parcel II in the United States and concluding that no compensation is due the District.

SUMMARY OF ARGUMENT

Parcels I, II and III should not have been segregated as they comprise a contiguous unit whose removal from the assessment rolls reduced the market value of the District's system.

The State, as bondholder, in addition to its inchoate lien on all the lands, had a present lien on the facilities of the District and when that lien is impaired, as it was by this taking, it is compensable.

The United States ought to be held to be estopped to deny its agreement to pay the District $149,-

000.00 by its unconscionable conduct in allowing its authorized Contracting Officer to make an offer and then approximately one year after the acceptance of the offer, repudiating it.

The lands in Parcel II (as well as in Parcels I and III) are still in the District and the District, by law, must stand ready to serve them upon demand. The effect of the taking was to damage the District and the damages are not consequential but are direct and ascertainable in the usual manner, i.e., the market value of the whole before the taking, less the market value of the whole after the taking.

ARGUMENT

THE GOVERNMENT SHOULD BE ESTOPPED TO DENY ITS AGREEMENT

The United States, after making its own analysis, determined that the just compensation to be paid for the taking of Parcels I, II and III was $149,000.00. Presumably, the Government felt that the State of Washington had some interest, as bondholder, and thus conditioned their offer upon the agreement of the District to pay off the outstanding bonds which then were in an amount of approximately $145,000.00. The District accepted the offer of the Government with the condition and, prior to December 10, 1951, the United States presented to the District a form of agreement and resolution prepared by their officials. The agreement, as pre-

sented by them, called for the contracting officer, Corps of Engineers, Walla Walla District, to execute the agreement on behalf of the Government and he was the authorized officer of the Government, acting within the bounds of his authority. After the District accepted the offer and executed the written documents presented by the United States to them they were advised that "in the near future" the $149,000.00 would be deposited in the registry of the Court and the matter would be closed by condemnation proceedings. The District was never advised that the Government was trying to avoid its own proposal for more than a year after it was made and accepted. Thus there was an acceptance which formed a contract between the District and the Government. In addition, the District relied upon the agreement both in their operation thereafter and in cooperating with the United States in facilitating the acquisition of other items not involved in the agreement.

It is recognized that as a general principal, the Courts have held that the Sovereign may not be estopped. On the other hand it is recognized that the doctrine of estoppel is based upon justice and good conscience. It is the contention of the appellant herein that the day has long since passed when the "King can do no wrong" and the principles of fairness and equity should be applied to the Government in its dealings with its citizens just as between private litigants.

The fact that the law is a living thing and is constantly growing and developing is evident from the fact that not many years ago, the principle that "The King Can Do No Wrong" was unassailable but in more recent years, the doctrine has been gradually deteriorating and appellant contends that it should be abolished. An example of the deterioration of the doctrine is seen in **Dayton Airplane Co. vs. United States** 21 F, (2d) 673 (6th Cir. 1927) where the Government sought to challenge an earlier settlement of a contract made during World War I. There was no dispute but that the Government representative had authority to make the settlement originally and the court held that the Government was estopped to challenge the earlier settlement, saying:

> "In this class of contracts and for the effect of future emergencies, if for no other reason, a sound public policy must require that the government must keep its contracts and stand by its settlements as an individual must."

In that case the Court specifically held that under the facts therein involved, the United States should be bound by the rules of estoppel and fair play.

A similar holding is found in **United States vs. Big Bend Transit Co.** 42 F. Supp. 459 (E.D. Wash. 1941) where the Government was held estopped to challenge a corporation's title based on grants of water rights where the grants were predicated on

acts of Congress and documents executed by the Secretary of the Interior.

In another District Court case, **United States vs. Brabham,** 122 F, Supp. 570 (D. C. S. C. 1954) the court held the United States estopped to assert a lien by the Farmers Home Administration on a farmer's crop because it failed to circulate its customary list of mortgaged crops among persons accustomed to buy such crops.

This Court, in **Los Angeles vs. Borax Consolidated, Ltd.,** 102 F. (2d) 52, held that the City of Los Angeles was estopped to deny that a landowner obtained good title to certain tidelands where City Officials represented that the City held no interest in the tidelands.

The unpopularity of the doctrine that "the King can do no wrong" and its gross inequity has been highlighted by numerous law review criticisms among them being "Prerogative Fallacy 'That the Crown Is Not Bound by Estoppel'.", 49 L. Q. REV. 511, and "Estoppel Against the Government", 21 U. CHI. L. REV. 680.

Here, the United States, dealing with a municipal corporation whose very life is at stake, made an offer through an authorized representative of the Government which offer was accepted. The Government in all fairness and good conscience should be estopped to deny the validity and the binding effect of the agreement so reached.

THE RIGHTS OF THE STATE OF WASHINGTON AS BONDHOLDER HAVE BEEN IMPAIRED WITHOUT JUST COMPENSATION

The State of Washington is the bondholder of the Columbia Irrigation District and those bonds, by statute, are a direct and immediate lien on all of the water rights and other property of the Irrigation District including canals, ditches and other facilities. R. C. W. 87.16.090. The provisions of this statute are recognized and enforced in **Clancy vs. Columbia Irrigation District,** 121 Wash. 79, 208 Pac. 27 and **State Ex Rel. vs. Hartung,** 150 Wash. 590, 274 Pac. 181. The United States took some of the canal facilities (though trivial in amount) and indirectly the government took the facilities of the District and their established water right, in part, by depreciating the value of those facilities. This has a direct effect upon the effectiveness of the bondholder's lien and constitutes a taking. It is recognized that the inchoate lien of a bondholder has no standing in law under these circumstances but we are here dealing with an actual present lien, as contrasted to an inchoate lien. This interest was taken without compensation of any kind being paid.

JUST COMPENSATION SHOULD BE PAID FOR THE LOSS IN MARKET VALUE OF THE DISTRICT'S FACILITIES

Appellant contends that Parcels I, II and III should not have been segregated as they comprise

a contiguous unit whose removal from the assessment rolls reduced the market value of the District's system. The fee titles taken in Parcel I and the interest taken in Parcels II and III result in a severance damage. The Trial Court refused the District's offer to prove that the total damage, measured by the reduction in the market value of the District as it existed before the taking and the market value as it existed after the taking, was $250,000.00. The District Court held that these damages, though real, were consequential and therefore non-compensable.

Appellant contends that it is inconsistent to hold that the Government could acquire anything in the taking of Parcel II, and simultaneously to hold that no compensable interest exists. If the Government took no property rights from the District by the taking of Parcel II in this proceeding, then the proceeding should have been dismissed as to Parcel II since there was nothing to be acquired. On the other hand, the Court specifically held that "all right, title and interest of the Columbia Irrigation District, a municipal corporation, defendant herein, in and to the lands in Parcel II—are hereby held and confirmed to have vested in the United States of America." If something vested in the United States by this judgment, that something must be a property right taken by the United States for which just compensation must be paid.

This is not a case where a business in the neigh-

borhood has a loss of business resulting from the taking since third parties who formerly patronized the business would no longer be patronizing it, or in other words, this is not a case involving consequential damages. This is a case involving the actual taking of lands and facilities from a District and severing them from the remainder causing a direct and immediate loss in the market value of the whole. This we submit is a direct loss which is compensable under the law.

The United States has not and did not exclude the lands taken in Parcel II (or in Parcels I and III) from the Irrigation District and under the Laws of the State of Washington, the District may be compelled to furnish service to irrigable lands within the boundaries of the District.

> "As soon as any public lands situated within the district are acquired by any private person, or held under any title of private ownership, the owner thereof shall be entitled to receive his proportion of water as in case of other land owners . . ." R. C. W. 87.01.210.

The appellant offered to prove that some of the lands involved in Parcel II are actually excessive to the Government's needs and may very well be declared excess and sold into private ownership at some future date. If this occurs, the Government would no doubt sell the excess lands as irrigated land which has a high value compared to the negligible value of the same land where irrigation water

is not available. Thus the Government may reap the benefit but under the decision of the District Court, they need not pay for it.

While it is true that this case is unique in its facts, insofar as the writer of this brief can ascertain, (usually there are other lands that can be brought within a district to utilize the excess capacity or the entire district is taken or a relatively trivial portion of the district is taken) nevertheless, a somewhat similar situation arose in the case of **Baetjer vs. United States,** 143 F. (2d) 391 (CCA 1st) where the condemnee owned various non-contiguous tracts of land devoted to the growing of sugar cane and also owned extensive facilities for the refining of sugar. The contention of the Government in that case was that the loss was a non-compensable business loss and the District Court struck all evidence on the matter of severance damages. The First Circuit Court of Appeals reversed saying in part:

> "If it (the excluded evidence relating to severance damage) means that after the taking the appellant's mills had an uneconomic over capacity so that they could not be operated by the appellant as efficiently and therefore as profitably as before the taking, then the stricken evidence shows only loss of business, which resulted as an unintended incident of the taking, and so a loss not compensable under the doctrine of **Mitchell vs. United States, supra.** (267 U. S. 341). On the other hand, if it means, and there is other evidence tending to show that this is what the witnesses, who used the

phrase, meant by it, that the overcapacity of the mills, with respect to cane lands available to supply them, has depreciated their value on the market—then the evidence would tend to show a compensable loss. In short, the stricken evidence would indicate a compensable loss only if it means that after the taking the appellant's mills had an uneconomic over capacity, so that they would not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider, in determining what he would pay for the property."

This, we submit, is exactly the nature of the offered proof of the appellant in this case since the appellant offered to prove that after the taking of the lands involved a willing buyer would pay $250,000.00 less for the District as an operating entity than it would have before. This, as the First Circuit Court of Appeals holds, would constitute a compensable loss.

A closely similar situation was involved in **United States vs. Aho, et al,** 68 F. Supp. 358, where Judge Fee made a careful analysis of the facts. In that case, a drainage district having a gravity flow system asserted that its facilities had lost market value by reason of the taking of a portion of the lands in the district from individual owners. Both the pertinent Oregon statutes and the pertinent physical situation involved are virtually identical with the statutes and situation involved in this case. There, a gravity flow drainage system was

involved from which the Government would benefit and here a gravity flow irrigation system is involved from which the Government, at least potentially, may benefit by either using the lands not flooded by the McNary Reservoir or the sale of those same lands at a high price. In both cases, the lands benefitted by the facility are practically valueless without the facility and the facility operates at virtually the same cost regardless of the area served. In holding the interest of the drainage district compensable Judge Fee made the following comments:

> "It has been consistently recognized that the reclamation of swamp and overflowed lands is of utmost importance to the communities involved and is touched with the public interest . . . If the costs had exceeded the benefits to all the lands in the District, the plan would have been rejected and the District dissolved.
>
> "The history of drainage and irrigation districts in the past few years has shown that these cooperative structures for specific purposes are subject to special dangers. If the plan of reclamation was not feasible because sufficient income was not collected for maintenance, The District would be unable to function in its essential capacity. If a portion of the lands became unproductive and unable to bear the weight of assessments, and the District did not receive income therefrom, it was in grave difficulty. This was emphasized in the depression where many parcels did not raise profitable crops and the payment of assessments went into arrears, and the District was required to levy higher assessments which fell

upon the better lands, whereby these likewise became unprofitable. The burden of delinquencies spread in geometrical proportion. By such disasters these entities created for the public purpose of reclamation of lands, were rendered helpless and after the passage of the Municipal Bankruptcy Act, many of them sought refuge under its aegis . . . If the United States condemns a certain proportion of these lands and thereafter refuses to pay the assessments, like results will follow in the District. If the United States had taken the parcels covered by the main drainage canals, and the parcel which contains the disposal pumps, and thus prevented the disposal of the waters, the District would likewise have ceased to function, but there compensation would be paid not only to the District for the physical properties taken, but also to the District as representative of the individual owners for the destroyed easements.

* * *

"The physical properties of water dictates the boundaries of a Drainage District. No less imperatively, economic feasibility dictates the size and cost of the works. The initial plan for development of these works is dependent upon these factors. All this points to the conclusion that the United States should pay the annual assessments to prevent disaster in projects created for a public purpose. But it is conceded that liability can neither be predicated upon need alone, nor solely upon public policy.

"The United States has, however, often paid compensation to a public corporation where easements or functions exercised for the benefit of the public at large, or those within the boundaries of the municipality were used or carried on at increased cost or inconvenience

by virtue of displacement, although strict property rights may not have been involved."

The soundness of the reasoning of the **Aho case** is emphasized in **Goodyear Farms vs. United States** 241 F. (2d), 484 (C. C. A. 9) where this court pointed out that "Not only the reasonable market value of the full fee simple title, **but every right in the land must be paid for.** Easements for ditches, for flow of water thereon and the right to payment therefor must be compensated if the evidence show these exist." (Emphasis supplied)

In that same case the court points out that the final judgment must read "just compensation for all property rights taken or destroyed. Otherwise the guarantee of the Fifth Amendment is not met." At a later point in the same decision we find the following:

> "The judgment, to be final, must either grant or deny compensation for the claimed interest of an easement burdening the land condemned, for ditches, works, the right to flow water thereon, and the right to collect compensation therefore, otherwise it is not final as to them."

In the **Goodyear** case a technical procedural question was involved so that the water company, in that particular proceeding, could not secure compensation. It should be noted that in our case, when the lands involved in Parcel II were taken from private owners, the District was not a party

in any way and in many of the cases, the land was acquired without condemnation proceedings so even had the District had knowledge, they could not have intervened since there were no proceedings. Thus, the only procedural way in which the District may be compensated for their rights is in this proceeding. The United States has recognized this obvious fact by instituting this very proceeding. As mentioned above, had the District had no right, title or interest in the lands in Parcel II there would be no reason to institute this proceeding, nor would there be any purpose in entering judgment.

The factual situation in this case should not be confused with cases where there is no contention of a loss of market value as in the case of **Yoknapatawpha Drainage District No. 2 vs. U. S.,** 242 F. (2d) 925 where the claim is based on the theory that there is a lien on the land taken whereas, in fact, the lien is only an inchoate lien or cases where none of the defendant's physical properties are situate on the lands taken.

The Supreme Court of the State of Washington in August of 1958 in the case of **Ackerman vs. Port of Seattle,** 152 Wash. Dec. 663, at page 668, quotes the words of Justice Holmes in **Pennsylvania Coal Company vs. Mahon,** 260 U. S. 393, as follows:

> " . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . ."

And in the same opinion at page 666 they quote Judge Traynor of the Supreme Court of California as follows:

> "More than ever social problems find their solution in legislation. Endless problems remain, however, which the courts must resolve without benefit of legislation. The great mass of cases are decided within the confines of stare decisis. Yet there is a steady evolution, for it is not quite true that there is nothing new under the sun; rarely is a case identical with the ones that went before. Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values. And in those cases where there is no stare decisis to cast its light or shadow, the courts must hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will best meet those tests. The task is not easy—human relations are infinitely complex, and subtlety and depth of spirit must enter into their regulation. Often legal problems elude any final solution, and courts then can do no more than find what Cardozo called the least erroneous answer to insoluble problems."

We submit that under the particular facts of this case, which are unique, the market value of a public corporation has been so depreciated by the action of United States in acquiring the land in Parcel II that a failure to compensate for the loss in the market value amounts to making a public improvement (McNary Reservoir) by a much short-

er cut than the constitutional way of paying for the change. The outstanding bonds are a millstone around the District's neck incurred to construct a facility which is now too large for the available consumption. Without the removal of that indebtedness (which can only be accomplished by the payment of just compensation in this case) the death knoll of the district has been tolled. The District Court, unfortunately, while recognizing the problem, reluctantly concluded that its hands were tied. Appellant submits that the hands of the Court must not be tied when just compensation must be paid.

Respectfully submitted,

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